COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP711 Cir. Ct. No. 2013TP000130

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO S. H., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

M. H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] M.H. appeals from a circuit court order terminating her parental rights to S.H. She argues that the circuit court erroneously exercised its discretion when it concluded that M.H.'s failure to appear at the July 9, 2014 dispositional hearing was not excusable neglect.[2] Because we conclude that the circuit court properly considered the relevant facts and law, and reached a conclusion that a reasonable court could reach, we affirm.

BACKGROUND

¶2 In March 2013, the State filed a petition to terminate M.H.'s parental rights to S.H. As grounds, the State stated that: (1) S.H. was a child in continuing need of protection or services, *see* WIS. STAT. § 48.415(2); and (2) M.H. had failed to assume parental responsibility, *see* § 48.415(6).

¶3 In April 2013, M.H. appeared with counsel for her initial appearance. The circuit court ordered M.H. to follow all court orders, to cooperate and stay in contact with her attorney, and to attend all court appearances in conjunction with the case. M.H. indicated, in response to the court's questioning, that she understood the court's orders. The court specifically warned M.H. that failing to appear for a court date could result in the court proceeding to a dispositional contest in her absence.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] M.H. continually refers to the circuit court's alleged "abuse of discretion" throughout her submissions to this court. However, our supreme court changed the terminology used in reviewing a circuit court's discretionary act from "abuse of discretion" to "erroneous exercise of discretion" in 1992. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992). Consequently, we use that terminology throughout our opinion.

¶4 M.H. appeared in court again in June 2013 for a permanency plan review hearing. The court, once again, ordered M.H. to follow all court orders, to cooperate and stay in contact with her attorney, and to attend all court appearances in conjunction with the case. The court told M.H. to update her attorney if her phone number, home address, or email address changed. The court, once again, specifically warned M.H. that failing to appear for a court date could result in the court proceeding to a dispositional contest in her absence. M.H. indicated that she understood the court's orders and the possible consequences of non-compliance.

¶5 In August 2013, M.H. appeared before the circuit court with her attorney and entered a no-contest plea to the continuing-need-of-protection-and-services ground. Once again, the court ordered M.H. to cooperate and stay in contact with her attorney and to attend all court appearances in conjunction with the case. The court also, once again, reminded M.H. to update her attorney in the event her contact information changed. The court again told M.H. that her failure to appear for a court date could result in the court proceeding to a dispositional contest in her absence, and M.H. indicated she understood.

¶6 On April 3, 2014, M.H.'s attorney filed a motion to withdraw as counsel for M.H. In the attached affidavit, M.H.'s attorney stated that M.H. had repeatedly ignored her requests for cooperation, failed to keep her attorney abreast of her progress, failed to appear for appointments with her attorney, and failed to abide by a previously agreed to payment plan. M.H.'s attorney requested that her motion to withdraw be heard at the very beginning of the next day's scheduled dispositional hearing.

¶7 M.H. failed to appear for the April 4, 2014 dispositional contest. The circuit court asked the parties for an update on M.H.'s progress. Her attorney

stated that she was not in a position to provide an update because M.H. had not contacted her. The circuit court then denied M.H.'s attorney's motion to withdraw as counsel of record. The court stated that, although it would grant the motion to withdraw in an ordinary civil case, the motion had to be denied because of the particularities of termination-of-parental-rights cases.

¶8 At the conclusion of the hearing, the circuit court continued the dispositional hearing until June 3, 2014; M.H. had previously been notified that a hearing would take place on that date. The court stated that the case would proceed forward on the next date regardless of whether M.H. appeared.

¶9 On June 3, 2014, M.H. appeared in court and the dispositional contest commenced. After testimony from two witnesses, the circuit court adjourned the remainder of the dispositional contest. The court scheduled the remainder of the dispositional hearing for July 9, 2014. The court ordered M.H. to stay in touch with and cooperate with her attorney and to follow all court orders. The court also ordered M.H. to appear on the next court date. The court explicitly informed M.H. that the hearing would proceed in her absence if she failed to appear. M.H. told the court she understood.

¶10 M.H. failed to appear for the July 9, 2014 dispositional hearing, despite the circuit court's warning. The court asked M.H.'s attorney if she had an explanation for M.H.'s failure to appear. M.H.'s attorney stated that M.H. had left her a voicemail on July 3, 2014, at 11:07 p.m., indicating that she was "giving up on the case." In the voicemail, M.H. went on to state that she "still didn't have nothing"; counsel stated she had not heard from M.H. since the voicemail. M.H.'s attorney told the court that M.H. had also failed to appear for a number of scheduled appointments with her attorney.

¶11 The circuit court, after hearing from M.H.'s attorney, noted that M.H. "apparently has chosen … to … [walk] away from this case." The court nevertheless noted that the dispositional contest must be concluded. After the hearing, and taking into account the factors outlined in WIS. STAT. § 48.426, the court determined that it would be in the best interest of S.H. that the parental rights of M.H. and the unknown father be terminated; consequently, the court entered a written order, as relevant here, terminating M.H.'s rights.[3]

¶12 On July 30, 2014, M.H. filed a Notice of Intent to Pursue Postdisposition Relief with the circuit court; however, she did not indicate the basis for relief. Thereafter, on May 11, 2015, M.H. filed a motion for remand with this court, asking us to remand the case back to the circuit court for fact-finding. M.H. contended that additional fact-finding was necessary to determine whether the matter should be re-opened because her failure to attend the final dispositional hearing on July 9, 2014, amounted to excusable neglect. We granted the motion.

¶13 On June 10, 2015, the remand hearing took place. M.H., through counsel, alleged that her failure to appear for the July 9, 2014 dispositional hearing was the product of excusable neglect. M.H. testified that, on July 7, 2014, she was hospitalized from 10:00 a.m. to 6:00 p.m. because of "bad muscle spasms and really bad back and neck problems." M.H. did not attempt to call her attorney or the case worker while hospitalized. At the conclusion of her hospital stay she was prescribed a muscle relaxer and ibuprofen.

[3] The Honorable John J. DiMotto presided over the plea and dispositional hearings, and entered the order terminating M.H.'s parental rights to S.H.

¶14 M.H. testified that after she was released from the hospital she stayed with a friend, and that the home phone at her friend's residence was off. In addition, M.H. stated that her cell phone service had been cut off on July 5, 2014. With respect to the pain she experienced, M.H. stated it was the same on July 8, 2014, and July 9, 2014. On both days she "couldn't do anything." M.H. did not try to make arrangements to place a phone call to her attorney on July 8, 2014. Furthermore, M.H. stated she "couldn't" make any effort to reach out to her attorney or the court on July 9, 2014. With respect to July 7, 2014, through July 9, 2014, M.H. stated that she was "feeling really sad" and "just didn't want to do anything."

¶15 M.H.'s attorney at the dispositional hearing also testified at the remand hearing. The attorney testified that she tried, prior to July 9, 2014, to reach M.H. so that she could properly prepare for the dispositional hearing, but had no luck in doing so. Additionally, during the time period preceding the July 9, 2014 dispositional hearing, M.H. failed to appear for a number of scheduled appointments with her attorney. During her testimony, the attorney also described, as she had already done on July 9, 2014, the voicemail message M.H. left her on July 3, 2014. The voicemail message was the last contact the attorney had with M.H. M.H. never contacted her attorney after the final July 9, 2014 dispositional hearing.

¶16 Anita Clark also testified at the remand hearing. During the summer of 2014, Clark worked as a supervised visitation worker on M.H.'s case. On July 5, 2014, M.H. cancelled a scheduled supervised visit. On that date, Clark reached out to M.H., and M.H. stated that "she wanted to give up because she had court on the 9th, and she didn't have all the things that she needed." Clark asked M.H. if she was sure of her decision, and M.H. indicated that she was. During the

conversation, M.H. did not express to Clark that she intended to ask the court at the upcoming court date for more time to complete her conditions of return or for more visits with her daughter.

¶17 Latrice Barbee also testified at the remand hearing. Like Clark, Barbee was a supervised visitation worker assigned to M.H.'s case in the summer of 2014. Barbee testified that, on July 6, 2014, M.H. cancelled a scheduled supervised visit. M.H. called Barbee and stated that "she didn't even see a point in going" to the upcoming court date. M.H. told Barbee that she "wanted to kind of give up because she felt like she was not financially stable and ready to take care of [S.H.]." According to Barbee, M.H. seemed "really, really distraught" and upset, "like she had given up."

¶18 The circuit court, after considering the evidence presented at the remand hearing, ruled from the bench. The court found that M.H.'s nonappearance was not a product of excusable neglect. In so holding, the court noted that "this is unfortunately a case where [M.H.] now is regretting her decision not to come to court on the disposition date and is seeking a way to ask this Court to reopen" the case. The court denied M.H.'s motion to vacate the dispositional order and to reopen the dispositional hearing.[4] This appeal follows.

DISCUSSION

¶19 The sole issue M.H. raises on appeal is whether the circuit court erroneously exercised its discretion when it concluded that M.H.'s failure to appear in court on July 9, 2014, for the conclusion of the dispositional hearing,

[4] The Honorable David Swanson presided over the fact-finding hearing on remand and found that M.H.'s failure to appear was not the result of excusable neglect.

was not the result of excusable neglect. M.H. contends that her testimony that she was hospitalized for two days prior to the July 9th dispositional hearing, and then spent several days recuperating in a home without access to a telephone, required the circuit court to conclude that her failure to appear amounted to "excusable neglect" and entitles to her to a new dispositional hearing. We disagree.

¶20 "A parent who … did not contest the petition initiating the proceeding in which his or her parental rights were terminated may move the court for relief from the judgment on any of the grounds specified in [WIS. STAT. §] 806.07(1) …." WIS. STAT. § 48.46(2). Whether to grant relief from a final order under § 806.07(1) is a discretionary determination for the circuit court. *See* ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985). "When we review a discretionary determination, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach."[5] ***Brandon Apparel Grp. v. Pearson Properties, Ltd.***, 2001 WI App 205, ¶10, 247 Wis. 2d 521, 634 N.W.2d 544.

[5] In her reply brief, M.H. conclusorily states that the standard of review set forth in ***Brandon Apparel Group v. Pearson Properties, Ltd.***, 2001 WI App 205, ¶10, 247 Wis. 2d 521, 634 N.W.2d 544, is inappropriate. M.H. asserts that this court should instead rely on the standard of review set forth in ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 326 N.W.2d 727 (1992), which states:

> "The trial court must undertake a reasonable inquiry and examination of the facts as the basis of its decision. The exercise of discretion must depend on facts that are of record or that are reasonably derived by inference from the record and the basis of that exercise of discretion should be set forth. This court will not find an [erroneous exercise] of discretion if the record shows that discretion was in fact exercised and if the record shows that there is a reasonable basis for the trial court's determination."

(continued)

¶21 WISCONSIN STAT. § 806.07(1)(a) permits a court to relieve a party from an order on the basis of "excusable neglect." ***Id.*** Excusable neglect is "'that neglect which might have been the act of a reasonably prudent person under the same circumstances.'" ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982) (citation omitted). "It is 'not synonymous with neglect, carelessness or inattentiveness.'" ***Id.*** (citation omitted).

¶22 Here, following the witnesses' testimony, the circuit court found that "this is not a case of excusable neglect." More specifically, the court held as follows:

> What the evidence indicates is this is a case that proves the old saying that hindsight is 20/20. We sometimes make decisions we regret later. I believe in this case that is what happened with [M.H.].
>
> The three witnesses all testified [M.H.] cancelled two visits with [S.H.] just in a few days within two weeks before this court date on July 9th.
>
> In those three conversations with her attorney and the two visitation workers, she indicated that she was giving up on the case.
>
> It's not clear that she stated she did not intend to come to court, but both the visitation workers provided very similar testimony and indicated that she told them she

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Id. at 471 (citation omitted). M.H. asserts that "[t]his different standard is critical here where the court made the specific inference from the facts in the record that [M.H.] 'decided not in fact to go to court' and [M.H.] argued in her brief that inference was unsubstantiated." (Record citations omitted.)

We discern no difference in the two standards of review. Both the standard of review set forth in ***Brandon Apparel***, as well as the standard of review set forth by ***Hedtcke***, require us to determine whether the circuit court undertook a reasonable inquiry and reached a reasonable conclusion, taking into consideration all of the evidence and relevant law. Our conclusion is the same under either standard, as both cases set forth the same standard, albeit using different language.

didn't have what she needed to go to court and on that basis she was giving up.

That certainly raises the inference she had decided not in fact to go to court, that she did not believe she had a chance of getting a favorable disposition based upon, one, what her attorney testified was her noncommunication with her attorney.

[M.H.'s attorney at the dispositional hearing] indicated that she had not been able to reach [M.H.] despite a number of attempts before the July 9th hearing; and that because of those attempts, she did not feel like she was prepared to represent [M.H.] at that July 9th hearing.

On that date[,] [M.H.] again did not appear. After that nonappearance, I think it's important to note that the only testimony the Court has or evidence regarding [M.H.'s] whatever medical situation she was in is [M.H.'s] own testimony.

There is no medical testimony or evidence presented to the Court, no hospital records, no opinion of any physician or nurse who saw her that day as to what her condition was.

However, we have [M.H.'s] own reports what her condition was on July 7th and again on July 9th.

It's also I think kind of telling that the friend in whose home she was staying was with her on the 7th and 8th, gone all day on the 9th, which, of course, was the court date, but back on the 10th; no real explanation why that person couldn't have provided some corroboration of whatever happened. Obviously that person is not available.

….

I'll note subsequent conduct also indicates that was her decision [not to appear]. She did not attempt to contact her attorney or the Court or any other party who testified on the day of the hearing or after.

I'll note this motion was filed on May 21st of 2015. That is about ten months after the hearing that we're talking about. In other words, no motion was immediately filed in this court asking for reconsideration or the Court to vacate that decision that was entered on July 9th.

> …. [B]ased upon the evidence presented today, the Court does not find there is really much question at all that this is unfortunately a case where [M.H.] now is regretting her decision not to come to court on the disposition date and is seeking a way to ask this Court to reopen the case.

¶23 In so holding, the circuit court did not erroneously exercise its discretion. The court appropriately credited the testimony of the three witnesses who testified that, in the days leading up to the July 9th dispositional hearing, M.H. had skipped two visitations with S.H. and had told both her attorney and two visitation workers that she had "given up" on her case. The court properly inferred from that testimony that M.H. purposefully chose not to attend the July 9th dispositional hearing and that her failure to attend the hearing was not "'that neglect which might have been the act of a reasonably prudent person under the same circumstances.'" *See* ***Hedtcke***, 109 Wis. 2d at 468 (citation omitted). In so holding, the court rooted its decision in the testimony elicited at the hearing and the relevant case law and reached a conclusion that a reasonable court could reach.

¶24 The circuit court also acted within its discretion when it evaluated M.H.'s testimony and implicitly found it incredible. The court founded that conclusion on M.H.'s failure to corroborate her testimony with "hospital records," the "opinion of any physician or nurse," or the friend with whom she allegedly stayed while she was injured. The court also called M.H.'s testimony into question based upon the testimony of the multiple witnesses who said M.H. had told them she had "given up" on her case, her failure to keep in contact with her attorney, and her ten-month delay in filing a motion to reopen the final termination

order.[6] Consequently, the court properly exercised its discretion when evaluating the weight to give to M.H.'s testimony.

¶25 In sum, the circuit court's finding that M.H.'s failure to attend the July 9th dispositional hearing was not excusable neglect is firmly based upon the testimony and evidence set forth at the fact-finding hearing and on the relevant law. The court's decision is not an erroneous exercise of discretion. As such, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[6] M.H. challenges the circuit court's reliance on her failure to move to reopen the judgment for ten months, on the grounds that it was inappropriate for the court to consider M.H.'s "exercise of her rights to seek a rehearing as evidence that she planned to miss the hearing she is seeking to reopen" because "[w]hatever [M.H.] did after she failed to appear at the July 9, 2014 hearing does not affect whether she missed the hearing based on excusable neglect." She also claims that "the circuit court's statement that [M.H.] did not do anything for ten months after the disposition hearing is inaccurate because she signed and filed a Notice of Intent to Pursue Post Disposition Relief within a month." We disagree.

To begin, the circuit court acted within its discretion in considering M.H.'s delay in filing her motion to reopen for ten months when weighing the veracity of M.H.'s testimony about her physical state on July 9th. As the State points out, "If M.H.'s failure to appear was truly, as she claims, the product of her medicated state, wouldn't she have contacted [her attorney] immediately afterwards and asked that a motion stating as much be immediately filed?" And while M.H. did, in fact, file a notice of her intent to pursue postdisposition relief on July 30, 2014, her notice does not state the basis for her motion. Moreover, the ten-month delay was not a substantial factor in the circuit court's decision; the court primarily relied on M.H.'s assertions that she had "given up" on the case, and her failure to corroborate her testimony. In short, the circuit court properly considered M.H.'s ten-month delay in filing her motion to reopen.